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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Christine Whalen, et al.,

Case No.: 23-cv-00459-VC

Plaintiffs,

v.

Kroger Co., Albertsons Companies, Inc.,
and Cerberus Capital Management, L.P.,

Defendants.

**STIPULATED REQUEST FOR AN ORDER
MODIFYING BRIEFING SCHEDULE
AND HEARING DATE FOR PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION AND DEFENDANTS'
MOTIONS TO DISMISS; [PROPOSED
ORDER]**

STIPULATION

Pursuant to Local Rule 6-2, IT IS HEREBY STIPULATED by and between Plaintiffs and Defendants The Kroger Co. (“Kroger”), Albertsons Companies, Inc. (“Albertsons”) and Cerberus Capital Management, L.P. (collectively, the “Parties”), by and through their respective attorneys of record that, if the Court approves, the hearing date for Plaintiffs’ Motion for a Preliminary Injunction (ECF No. 28), filed March 23, 2023 (“PI Motion”) shall be modified as

follows: the PI Motion shall be heard on June 22, 2023, or as soon thereafter as the Court may deem appropriate.

In addition, IT IS HEREBY STIPULATED by and between the Parties, by and through their respective attorneys of record that, if the Court approves, the briefing schedule and hearing date for Defendants' Motions to Dismiss (ECF Nos. 40, 42 and 48), filed April 12 and 13, 2023 ("Motions to Dismiss") shall be modified as follows: (1) Plaintiffs' Opposition to Defendants Motions to Dismiss shall be due May 11, 2023; (2) Defendants' Replies in Support of the Motions to Dismiss shall be due May 25, 2023; and (3) the Motions to Dismiss shall be heard on June 22, 2023, or as soon thereafter as the Court may deem appropriate.

In support of the stipulation, the Parties state as follows:

1. On February 2, 2023, Plaintiffs Christine Whalen, Gabriel Garavanian, Sondra K. Russell, Pamela Faust, Lisa McCarthy, Katherine R. Arcell, June Stansbury, Timothy Niebor, Clyde D. Stensrud, Len Marazzo, Yvonne Jocelyn Gardner, Pamela S. Ward, Brenda K. Davis, Jose M. Brito, Don Freeland, Harry Garavanian, Bill Rubinsohn, Valarie Ann Jolly, Michael C. Malaney, Carolyn Fjord, Jan-Marie Brown, Gary Talewsky, Deborah M. Pulfer, Donna Fry, and Rosemary D'Augusta (together "Plaintiffs") filed a complaint (the "Complaint") against Kroger, Albertsons, and Cerberus Capital Management, L.P. ("Cerberus") in Case No. 3:23-cv-459.

2. On February 23, 2023, the Defendants Kroger and Albertsons entered into a stipulation with Plaintiffs extending the time for Kroger and Albertsons to answer or otherwise respond to the Complaint by 45 days, from March 1, 2023, to April 17, 2023.

3. Defendant Cerberus, was served on March 27, 2023.

4. On March 23, 2023, Plaintiffs filed the PI Motion, which seeks an injunction prohibiting a proposed merger between Albertsons and Kroger and prohibiting and/or disgorging

the payment of a dividend that Albertsons paid on January 20, 2023 to its shareholders, including Cerberus.

5. On April 3, 2023, this Court granted the Parties' stipulated request for an order modifying the briefing schedule and hearing date for the PI Motion (ECF No. 30). It ordered that: (1) Defendants' Opposition to Plaintiffs' PI Motion shall be due April 20, 2023; (2) Plaintiffs' Reply in Support of the PI Motion shall be due May 4, 2023; and (3) the PI Motion shall be heard on May 18, 2023.

6. Accordingly, without the Court's approval of this stipulation, the hearing on the PI Motion would be heard on May 18, 2023; Plaintiffs' Oppositions to the Motions to Dismiss would be due April 26 and 27, 2023; Defendants' Replies in Support of the Motions to Dismiss would be due May 4, 2023; and the hearing date on the Motions to Dismiss would be held on May 18, 2023.

7. Kroger and Albertsons stated in an October 14, 2022, press release announcing that they had entered into an Agreement and Plan of Merger that the transaction is not expected to close until 2024. Kroger reiterated this representation on its fourth quarter and full year 2022 earnings call on March 2, 2023. Plaintiffs have requested that Kroger and Albertsons stipulate that the transaction will not close prior to July 1, 2023, to allow time for the Court to rule on Plaintiffs' Motion for Preliminary Injunction. Consistent with the parties' previous statements that the transaction is not anticipated to close until 2024, Kroger and Albertsons hereby stipulate that the transaction will not close prior to July 1, 2023.

8. The Parties stipulate to the modified briefing schedule and hearing date set out below to allow adequate time to brief and prepare for the PI Motion and the Motions to Dismiss. In addition, Plaintiffs' counsel have developed a conflict with the currently scheduled hearing date of May 18, 2023. Although there has been one prior stipulation modifying the hearing date and

briefing schedule on the PI Motion and one prior stipulation modifying the briefing schedule for the motion to dismiss, because this case is still in its early stages, because the merger transaction will not close prior to July 1, 2023, because the Defendants contend the dividend has already been paid, and because the PI Motion and Motions to Dismiss are the only substantive filings in this court, granting this stipulation, subject to the convenience of the court, will not prejudice any party.

Accordingly, IT IS HEREBY STIPULATED AND AGREED, by and between undersigned counsel and subject to Court approval, as follows:

1. The proposed merger between Albertsons and Kroger will close no earlier than July 1, 2023;
2. Plaintiffs' Oppositions to Defendants' Motions to Dismiss shall be due no later than May 11, 2023;
3. Defendants' Replies in Support of Defendants' Motions to Dismiss shall be due no later than May 25, 2023; and
4. The Motion for Preliminary Injunction and Motions to Dismiss shall be heard on June 22, 2023, or as soon thereafter as the Court may deem appropriate.

Dated: April 25, 2023

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SIGNATURE ATTESTATION

I, Lawrence Papale, am the ECF user whose ID and password are being utilized to electronically file this **STIPULATED REQUEST FOR AN ORDER MODIFYING BRIEFING SCHEDULE AND HEARING DATE FOR PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MOTIONS TO DISMISS; [PROPOSED ORDER]**. Pursuant to Local Rule 5-1(i)(3), I hereby attest that the other signatories have concurred in this filing.

DATED: April 25, 2023

/s/ *Lawrence Papale*

LAWRENCE G. PAPALE

[PROPOSED] ORDER

Having considered the parties' stipulation, the court hereby ORDERS that the proposed merger between Kroger and Albertsons will not close prior to July 1, 2023; Plaintiffs' Oppositions to the Defendants' Motions to Dismiss shall be due May 11, 2023; Defendants' Replies in Support of Defendants' Motions to Dismiss shall be due May 25, 2023; and Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Dismiss shall be heard on June 22, 2023.

IT IS SO ORDERED.

DATED: April ___, 2023

HONORABLE VINCE CHHABRIA
United States District Judge